Office - Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
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82-1067
No. ———

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES GAMBREL
CONSUMER ASSOCIATION OF KENTUCKY, INC.
CITIZENS FOR DENTURISM IN KENTUCKY, INC.
HAROLD RAY DRUIN
JAMES RENFRO, SR.
JAMES RENFRO, JR.
DAN HAUNER
JAMES GAMBREL
CHESTER HUDSON - - - - - - - Petitioners

versus

THE KENTUCKY BOARD OF DENTISTRY,
JAMES W. HOLLIDAY, D.M.D.
HAROLD BRADFORD, D.M.D.
JAMES M. SMITH, JR., D.M.D.
O. HARLAN WILSON, D.M.D.
HOWARD TITSWORTH, D.M.D.
PAUL WEBB, D.M.D.
JOHN HOYLE
STEVEN L. BESHEAR, As Successor to Robert Stephens, Attorney General, Pursuant to KRS 418.075
LEWIS WHIPPLE, D.M.D.
DOUGLAS KENNEDY, D.M.D.
GORDON KING, D.M.D.
WILLIAM WILLIS, D.M.D.
GLENN M. BARNES, D.M.D.
THE KENTUCKY DENTAL ASSOCIATION, INC - Respondents

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR PETITIONERS

(See inside cover for list of Attorneys)

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

GEORGE C. PONTIKES
SHELDON GARDNER
FOSS, SCHUMAN & DRAKE
11 South La Salle Street
Chicago, IL 60603
Tel. (312) 782-2610

FRANKLIN S. YUDKIN
400 Hart Block Bldg.
730 W. Main Street
Louisville, KY 40202
Tel. (502) 589-4626

Counsel for Petitioners

QUESTIONS PRESENTED

Preamble In Kentucky, dentures are a prescription filled item and all dentists and dental laboratories are licensed by the Commonwealth. Further, while the State statute may prohibit dental laboratories from selling or delivering dentures to consumers, it does not prohibit consumers from specifying the dental laboratory they wish to retain, to fill their dentist's prescription.

Question I. Does the current denture delivery system in Kentucky exceed state law provisions and violate the Sherman-Clayton Antitrust Laws, Title 15 USCS Section 1 and 2 *Et Seq.*, insofar as dentists who combine, conspire and agree, in restraint of trade, to: (1) boycott dental laboratories who offer or advertise lower than "normal" prices, and (2) concertedly refuse to let their patients specify or negotiate prices with, this independent business man (the dental laboratory), even though the protection of public health and safety does not require such restrictions.

Question II. Does the ethical opinion of the Kentucky Dental Association or state law, violate the Petitioner's First Amendment right to commercial free speech to advertise and solicit denture prescriptions?

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HAROLD RAY DRUIN
JAMES RENFRO, SR.
JAMES RENFRO, JR.
DAN HAUNER
JAMES GAMBREL
CHESTER HUDSON - - - - - - - *Petitioners*

v.

THE KENTUCKY BOARD OF DENTISTRY,
JAMES W. HOLLIDAY, D.M.D.
HAROLD BRADFORD, D.M.D.
JAMES M. SMITH, JR., D.M.D.
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GLENN M. BARNES, D.M.D.
THE KENTUCKY DENTAL ASSOCIATION, INC. - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

DECISIONS BELOW

The United States District Court for the Western District of Kentucky issued a summary judgment order on April 3, 1980, against the Petitioners. (A copy of the decision is found in the appendix.) The United States Court of Appeals for the Sixth Circuit affirmed that decision (in a 2-1 decision) on September 24, 1982, 689 F. 2d 612. (A copy of the decision is found in the appendix.) A Request for a Petition En Banc was denied on November 16, 1982. (A copy of this is found in the appendix.)

JURISDICTIONAL STATEMENT

The Petitioners invoke this Court's jurisdiction under Title 28 USCS, Section 1254, pursuant to appeals from the Court of Appeals. This Appeal is from a decision entered on September 24, 1982, and this petition will be timely if filed by mail on or before December 24, 1982, without an extension.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law respecting . . . or abridging the freedom of speech or of press . . ."

United States Constitution, Fourteenth Amendment, which states in pertinent part:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the law."

The Sherman-Clayton Anti-Trust Acts, 15 USCS, Section 1, et seq.

The Kentucky Dental Practice Act found in Kentucky Revised Statutes, Chapter 313.

STATEMENT OF THE CASE

This Petition for Certiorari stems from a 2-1 decision of the Sixth Circuit Court of Appeals.

The case involves The Kentucky Dental Practice Act and is based on the facts that the Kentucky Dental Assoication (a private trade group), and it's members exceeded all statutory authorities and restricted trade with the various Kentucky Dental laboratories, all of whom are licensed by the Commonwealth. The Petitioners claimed this was all done against what the United States Supreme Court has said for years is a *per se* violation of the Sherman-Clayton Antitrust Acts.

The particular sections of the Kentucky Dental Practice Act in question, (see appendix), are the definition sections of what a dentist and a dental laboratory are (KRS 313.010(2)(4)(5)) and the denture prescription section (KRS 313.247(1)).

The Petitioners' proof had developed (prior to being cut off by the summary judgment of the District Court) that the Dental Association solidified their past practices and plotted their monopoly course, at a "dental laboratory workshop" held at a Louisville motel on July 6 & 7, 1977.

Under the guise of a public health statute, this Association then permeated it's membership with the knowledge that they should restrict their denture prescriptions only to those laboratories that co-operate and approve of the Dental Association's philosophies. The Association when further than this by assigning two attorneys, paid for by the Association, to the State Licensing Board, to prosecute those who violated "the rules of the workshop". In addition to this, the Association reaffirmed it's prior ethical opinion which prohibited dentists from allowing patients to freely choose among the dental laboratories to fill the denture prescription.

Attached to the Complaint, (a copy is found in the appendix) was a newspaper advertisement of the Petitioner, Gambrel, advertising his prices for filling the denture prescription at his laboratory. The Petitioners' affidavits filed in the District Court, showed that consumers and private investigators swore that no dentist they dealt with, would allow the denture prescription to be sent to Gambrel's laboratory, or other Petitioners (although they hold a valid Kentucky license).

The Petitioners' Complaint, filed May 16, 1978, was by six Kentucky licensed dental laboratory technicians, two non-profit state wide consumer organizations and a senior citizen, who was a consumer of dentures. The Complaint stated that the practices stated above, violated the Sherman-Clayton Antitrust Acts, and made the laboratories lose their First Amendment right of commercial free speech, by restraining

the denture prescription trade to those laboratories selected by the dentists, and not allowing the Petitioners' laboratores to be on that list, and further not allowing the dentist's patient the right of selecting the laboratory he/she wished to have his prescription filled at.

The Respondents in this case, are the Kentucky Dental Association, the Kenutcky Board of Dentistry, the Kentucky Attorney General (although he has not participated in any aspect), and five individual dentists, whom the Petitioner sent consumers or investigators to, concerning the allegations stated above.

The Respondents claim in this action, that their right to restrict access to the denture prescription to only those laboratories that the individual dentists want to use, to the exclusion of the Petitioners, was a result of state law, rather than their own combination, conspiracy or restraint of trade. (But the Respondents admitted in the argument to the Sixth Circuit Court of Appeals, that no dentist has ever been prosecuted in the Commonwealth of Kentucky for violating any of the statutes referred to). The Petitioners state that the practices described are not articulated or affirmatively expressed in state law, nor is there any state policy to that effect that is actively supervised by the Commonwealth.

The Petitioners had obtained a Restraining Order against the violations stated in the factual complaint, in the Jefferson Circuit Court in Louisville, Kentucky, which was in effect from December 19, 1977, through January 6, 1978, when it was dissolved by a different

Circuit Judge than one who issued it. (Although the Dental Association admitted that they never complied with it).

On appeal, the dissolving was upheld by the Kentucky Court of Appeals and the Kentucky Supreme Court refused certiorari. (April 25, 1978).

The Petitioners' Complaint asked for a declaratory judgment and an injunction against the practices that the Petitioners claim were in violation of the Sherman-Clayton Antitrust Acts, and the First Amendment. Further the Petitioners asked for a jury trial on Anitrust damages. The Petitioner also backed up his Complaint by requesting that any language in the Kentucky Dental Practice Act, which would permit a monopoly to exist, which was not supportive of public health or police power of this Commonwealth, be declared unconstitutional. While the Petitioner took depositions, and submitted affidavits to the Court, the Respondents put forth no proof on this case, except to make a motion for summary judgment. The Petitioners appealed that summary judgment of the United States District Court for the Western District of Kentucky, at Louisville, dated April 3, 1980 to the Sixth Circuit Court of Appeals. The Petitioners now ask for certiorari to this Court, from a 2-1 decision of the Sixth Circuit Court of Appeals, dated September 24, 1982, and found in 689 F. 2d 612. Further a motion for a rehearing was denied on November 16, 1982.

REASONS FOR GRANTING THE WRIT

I. Does the Current Denture Delivery System in Kentucky Exceed State Law Provisions and Violate the Sherman-Clayton Antitrust Laws, Title 15 USCS Section 1 and 2 *Et Seq.*, Insofar as Dentists Who Combine, Conspire and Agree, In Restraint of Trade, to: (1) Boycott Dental Laboratories Who Offer or Advertise Lower than "Normal" Prices, and (2) Concertedly Refuse to Let Their Patients Specify or Negotiate Prices With, This Independent Business Man (the Dental Laboratory), Even Though the Protection of Public Health and Safety Does Not Require Such Restrictions.

This case effects 41% of the men and 34% of the women in the Commonwealth of Kentucky over age 18,* as they are in part or wholly edentureless.

The Petitioners state that substantial questions of federal law are presented herein to be worthy of granting a writ of certiorari.

The Petitioners state that even though the Commonwealth of Kentucky under KRS 313.010 and 313.247, in the exercise of its police power to protect public health, included dentures in the practice of dentistry (as dentures used to even be a mail order item), the private Kentucky Dental Association and it's members went further than the law set forth or the protection of public health warrants by:

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*According to the National Center for Health Statistics, Series II, NG 27, Total loss of teeth in adults in the U. S. 1960-1962, U. S. Government Printing Office, 1967, P. 23. Reprinted in Kentucky, Health Sciences Education—Dentistry, Comprehensive Planning Phase I Report, Counsel on Higher Education, Frankfort, KY, September, 1975.

1) Articulating a policy that each dentist should excessively control the denture prescription by selecting the laboratory he wishes to have it filled at, to the exclusion of all other laboratories, even though all laboratories are licensed by the Commonwealth.

2) Entering into a group boycott of the Petitioners and other laboratories, thereby eliminating or reducing competition among all dental laboratories in the market place.

3) Hiding the cost of filling the denture prescription by including it in the sum total of the dentist's bill, and thereby controlling the price and reducing price competition among competing laboratories.

In simple terms, this case is nothing more than a private price fixing division of merchants and group boycott case, by those seeking to hide behind state public health or "ethics".

The 1963 ethical opinion of the Kentucky Dental Association (Appendix) prohibits dentists from giving a denture prescription to their patients, or from allowing them to choose their own dental laboratories to fill the prescription. By this ethical opinion, the dentist controls the dental laboratories and limit their ability to obtain business and in this way control the free market price.

With dentures, as with prescription drugs or eyeglasses, a prescription is written by the dentist and then filled by the dental laboratory. The Petitioner con-

tends that the language in KRS 313.247 states nothing as to how the prescription gets from the dentist to the dental laboratory.

The Petitioners further state that the total enforcement of the law has thus far been only with the private Kentucky Dental Association, as no dentist has ever been prosecuted by the Comonwealth, for violating the above statutes. The state has thus been inactive in this area at all times material hereto.

The Petitioners' position is that Kentucky Law, as stated in KRS 313.247, and interpreted in *Kentucky State Board of Dental Examiners* v. *Steely,* Ky., 291 S. W. 2d 823 (1956) allows solicitation of prescription (such as Gambrel's) by dental laboratories, and that the prohibition which Petitioners challenge herein only lies in the Dental Association's ethical opinion. The Petitioners' position is tht the Commonwealth never gave a blank check to private individuals to engage in a conspiracy to violate this nation's Anti-Trust Laws.

The Petitioners state that the District Court's Summary Judgment, as upheld by the Sixth Circuit Court of Appeals (in a 2-1 decision), was in error, since it went against the following line of cases:

United States v. *National Association of Real Estate Boards,* 339 U. S. 485, 94 L. Ed. 1007, 70 S. Ct. 711 (1950). *Gibson* v. *Berryhill,* 411 U. S. 564, 36 L. Ed. 2d 488, 93 S. Ct. 1689 (1973). *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 44 L. Ed. 2d 572, 95

S. Ct. 2004 (1975). *Bigelow* v. *Virginia,* 421 U. S. 809, 44 L. Ed. 2d 600, 955 S. Ct. 222 (1976). *Health Systems Agency of Northern Virginia* v. *Virginia State Board of Medicine,* 424 F. Supp. 267 (1976). *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976). *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977). *Consumer Association of Kentucky, Inc.* v. *The Kentucky Board of Optometric Examiners* (Case 76-26, Eastern District of Kentucky, November 1, 1977, a three Judge Federal Court Decision striking down Kentucky's price advertising ban). *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 20 L. Ed. 2d 642, 92 S. Ct. 609 (1977). *National Society of Professional Engineers* v. *United States,* 435 U. S. 679, 55 L. Ed. 637, 98 S. Ct. 1355 (1978). *City of LaFayette* v. *Louisiana Power & Light Co.,* 435 U. S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978). *Reiter* v. *Sonotone,* 442 U. S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2336 (1979). *McLain* v. *Real Estate Board of New Orleans,* 444 U. S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980). *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.,* 445 U. S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980). *National Germedical Hospital and Gerontology Center* v. *Blue Cross of Kansas City and Blue Cross Association,* 452 U. S. 378, 69 L. Ed. 2d 89, 101 S. Ct. 2415 (1981)—Health providers not immune to antitrust laws under Sections 1 and 2 of the Sherman Act. *Arizona* v. *Maricorpa County Medical Society,* —— U. S. ——, 73 L. Ed. 2d 48, 192 S. Ct. —— (1982). *Blue Shield of*

Virginia v. *Carol McCready*, —— U. S. ——, 73 L. Ed. 2d 149, 192 S. Ct. —— (1982). *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corporation*, —— U. S. ——, 72 L. Ed. 2d 330, 102 S. Ct. —— (1982). *Consumers Union of the U. S., Inc.* v. *American Bar Association*, 505 F. Supp. 822 (E.D. Va. 1981)—Holding the members of the Virginia Supreme Court accountable for damages. *Alcoholic Beverage Control Board of the Commonwealth of Kentucky* v. *Taylor Drug Stores*, Ky., 635 S. W. 2d 319 (1982), striking down Kentucky's Liquor Fair Trade Law and *U. S.* v. *Dairymen, Inc.*, 660 F. 2d 192 (1982).

The Petitioners' case for certiorari is that the refusal to allow the customer to choose his own laboratory, makes the advertising of Petitioner Gambrel (see Addendum) useless and allows the Appellees to violate the Sherman-Clayton Antitrust laws: 1) by boycotting the dental laboratory of the Petitioners, 2) requiring consumers to pay higher costs for dentures, 3) not allowing the freedom of choice as to where they want their prescriptions filled, 4) and this allows the dentist to hide the cost the laboratory charge from the consumer, 5) and allows the dentist to monopolize the denture market, by combining and contracting only with certain dental laboratories.

The Petitioners' position for certiorari is that the prescription/work orders belong to the patients, not the dentists; the right to the selection of the dental laboratory, belongs to the patient, not the dentist, and the right to pay for the laboratory charge, belongs to the patient and should not be lumped into dentist's sepa-

rate work, and that public health would not be affected by allowing consumers to select their own dental laboratories.

The Appellants state, that this Court should reverse the Summary Judgment, since the same basic issues are here, as are in the long line of cases starting from 1926, *United States* v. *Trenton Potteries Company,* 273 U. S. 392, 71 L. Ed. 700, 47 S. Ct. 377, 50 ALR 989 (1926), *United States* v. *Socony-Vacuum Oil,* 310 U. S. 150, 84 L. Ed. 1129 (1939), *Otter Tail Power Company* v. *United States,* 410 U. S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973), *Cantor* v. *Detroit Edison Company,* 428 U. S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976). Just as Detroit Edison could not include light bulbs as a part of their electric service to the exclusion of other independant dealers, the Respondents' position should not be allowed to stand. (The dissenting Judge in the Sixth Circuit, the Hon. Judge Feikens, was the District Judge in the *Cantor* case.)

The question before this Court is, is the Commonwealth of Kentucky restricting the supply of dentures or are the Kentucky Dental Association members restricting the supply of dentures, for their own economic gain? In *McKlemurry* v. *State of Mississippi,* 417 S. 2d 554 (1982), the Supreme Court of Mississippi stated that putting a denture in someone's mouth was not the practice of dentistry, and the Court went on to say

> "Laws regulating in the profession should not be so construed as to prevent the performing of uncomplicated services between persons in the

course of their relationship with another, in this educated and informed society."

Clearly, the Commonwealth of Kentucky has no reason to be in the tying arrangement, nor does the legislative history of the Kentucky Dental Practice Act support one.

The Petitioners to this Court state that the same issue is presented here, as was presented in *Goldfarb* v. *Virginia State Bar, supra.* That is, that the public has the right to shop for dental laboratories, just as they do attorneys, to seek the lowest price for a compatible item. For clearly, dentures are a separate, removable, and identifiable product, exclusive of dental work. This is the same as eyeglasses and pharmaceuticals, which are separate and identifiable consumer products.

What we're dealing with in this case, is a conscious refusal to deal, as was set forth in the affidavits, of the dental laboratory technicians, consumers of dentures and those of the Burns Detective Agency, see *Standard Oil Company* v. *United States,* 337 U. S. 293, 93 L. Ed. 1373 (1949). Without this Court's writ of certiorari, the practice unfortunately will continue, to the detriment of over 1 million Kentuckians.

A. PARKER v. BROWN ARGUMENT

The Petitioners claim that this case stems from the ethical opinion of the Dental Association and not from legislative action, and therefore, the old case of *Parker* v. *Brown,* 317 U. S. 341, 87 L. Ed. 314, 63 S. Ct.

307 (1942), which deals with state action, will not be applied, but rather the exceptions will.

The heart of the Sixth Circuit Appeal was:

> "We believe the critical distinction between the facts here and those in Cantor and Midcal Aluminum, Inc., is that here the conduct of the Respondents eminates directly from the mandate of state law in a well developed and long established statutory scheme. It is not left to the private sector to decide what the policy is or whether it is to be complied with."

The dissenting Judge Feikens stated in his opinion:

> "I believe the Supreme Court meant more. The State must not only clearly articulate it's policy in legislation, specifying standards of conduct, it must also actively supervise the policy by actively enforcing the legislation. Because the record in this case does not reflect the State has enforced it's policy, I can not agree with majority . . ."

The Appellants contention is that the case before this Court of Appeals is so similar to *Cantor, Goldfarb* and *Bates* that *Parker* v. *Brown, supra,* does not apply. There is also a good discussion on this point in the annotations following *Boddicker* v. *Arizona State Dental Association,* 549 F. 2d 326, 39 ALR Fed. 761 (1977), cert. den. 54 L. Ed. 2d 83, 96 S. Ct. 73.

The District Court in it's Summary Judgment Opinion also relied on *Schiller* v. *the Illinois State Dental Society,* Civil Action, No. 78C-3936 (N. D., Ill. 1979). This particular case was appealed to the Sev-

enth Circuit Court of Appeals and was reversed on December 3, 1980, in a decision by Chief Judge Thomas Fairchild (unpublished) case No. 79-1529, cert. denied 68 L. Ed. 2d (1981). There is therefore a difference among the various circuit courts, concerning similar issues.

Under these circumstances, the Appeal's Court should have dealt with this case under the standard set forth in *California Liquor Dealers* v. *Midcal Aluminum, supra* (page 243):

> "These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be 'one clearly articulated affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *City of Lafayette* v. *Louisiana Power and Light Company,* 435 U. S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978) (Opinion of Brennan, J.)

Yet there is no history of enforcement by the Kentucky Board of Dentistry, against any dentist for giving a prescription to a consumer or allowing a consumer to choose and pay for his own laboratory.

John Hoyle, the consumer member of the Kentucky Board of Dentistry said in his deposition at page 3:

> "Q. 7. The case we are dealing with, is a case in Federal Court about the right of the patient to take their prescription to a dental laboratory of his own choice. How do you feel about the right of the consumer patient to chose his own laboratory?

A. I think that the patient should have the right to choose a dental laboratory they would like to do their work for them."

See also *Rice* v. *ABC Appeals Board,* 21 Cal. 3rd 431, 96 ALR 3d 613 (19—) and *Moore* v. *Matthews,* 550 F. 2d 1207, 46 ALR Fed. 497 (1977), and *Cataland, Inc.* v. *Target Sales, Inc.,* 446 U. S. 643, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980).

Dr. A. B. Coxwell, former Executive Director of the Kentucky Dental Association, said in his deposition, p. 50:

Q. 304. Who has the right to change the ethical opinion?

A. The Louisville Dental Society.

Q. 305. K.D.A. has no right to change it?

A. They have the same ethics as the American Dental Association.

Q. 306. So the K.D.A. couldn't change it unless the American Dental Association would change it?

A. Yes, we could change it if we wanted to as far as Kentucky is concerned.

B. THE MARKET ALLOCATIONS ASPECT

The Petitioners' contention is that under the current practice, a Kentucky dentist can allocate all of his dental laboratory business to one or two laboratories and can refuse to deal with all others. This allocation of markets limits the usefulness of the license granted to all dental laboratories by the Commonwealth (KRS

313.510) and restricts the right of all dental laboratories to compete freely, to exist, and to make a profit as independent businessmen. The Petitioners contend that the current practice violates the Sherman-Clayton Acts, see *United States* v. *Parke Davis Company*, 362 U. S. 29, L. Ed. 2d 505, 80 S. Ct. 503 (1960); *Fortner Enterprise Inc.* v. *United States Steel Corp.*, 394 U. S. 495 (1969). See *United States* v. *Topco Assocoiates*, 405 U. S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972), and *United States* v. *Sealy, Inc.*, 388 U. S. 350, 18 L. Ed. 2d 1238 (1967); *Community Communication Co.* v. *City of Boulder*, 70 L. Ed. 2d 810 (1982).

C. THE BOYCOTT ASPECT

The Affidavits of the consumers and dental laboratory technicians, and such statements from Appellee dentists, as from Gordon W. King, D.M.D., in his deposition, page 37, shows the boycott aspect of this case:

> "Q. 216. . . . (If) he (Durham) wanted Gambrel's Denture Studio to do the work pursuant to the ad; would you have allowed the prescription to go there?
>
> A. By way of how?
>
> Q. 217. Either him bringing it to Mr. Gambrel, that would be answer number one, and
>
> A. No, I would not.
>
> Q. 218. Okay.
>
> A. Number two would be that Gambrel would come by and pick it up just like Progress does.

A. Well, being unfamiliar with Gambrel Studios—Dental Studios I probably would not have sent it to Gambrel.

Q. 219. Even if Mr. Druin had wanted it there you would not have done it?

A. No.

Q. 220. You would have told Mr. Druin, 'No, we cannot send it there'?

A. Right."

This example shows that there is a boycott of the Petitioners. The reasons for the boycott are about three: (1) that the dental laboratory Petitioners expressed their First Amendment right of commercial free speech by advertising for prescription business, (2) they expressed their First Amendment right by expressing openly their dislike for the present denture delivery system, (3) and/or because they filed suits in state and federal Court challenging the present system. See *Fashion Originators Guild* v. *F.T.C.*, 312 U. S. 469, 85 L. Ed. 955 (1941); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959); *United States* v. *Parke Davis & Company, supra,* and *United States* v. *General Motors,* 384 U. S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966).

C. THE CONTRACT, COMBINATION, OR CONSPIRACY ASPECT

The Kentucky Dental Association held a "workshop" at the Breckinridge Inn, in Louisville, on July 6-7, 1977, on how to combat and eliminate the Petitioner dental laboratories, because they openly ad-

vocate the points set forth in this case. This was followed by a closer tie-in between the Kentucky Dental Association (the private trade association) and the Kentucky Board of Dentistry (the State Licensing Board). The Board was given an extra two (2) attorneys, who were paid for by the Dental Association, to be used exclusively to harass and prosecute the Petitioner dental laboratory technicians. Over FIFTY THOUSAND DOLLARS ($50,000.00) was spent for these attorneys, and paid for by a special assessment of ONE HUNDRED DOLLARS ($100.00), contributed by Dental Association and Dental Board members.

In the deposition of Porter Richmond, the Dental Association President, there is a discussion of what happened at a Kentucky Dental Association's meeting in September, 1977 (pages 52-53):

> "Q. 186. What knowledge did you have?
>
> A. Let's say that there—I can't tell you who, name anybody specifically, but I know there have been complaints from all areas, not all areas, but several areas of Kentucky that there has been—do you want me to say laboratory technicians?—well, I'll say laboratory people that have been seeing patients and making dentures. That's been reported so we decided to investigate it.
>
> Q. 187. What was John Fowler to do, what was he authorized?
>
> A. Take necessary steps to prosecute all persons practicing illegal dentistry in the State of Kentucky.
>
> Q. 188. And whose names did he prosecute?

Porter Richmond, D.D.S.: Whose names?

Q. 189. Yes, who was to be the proponent?

A. The Board of Dentistry was who was, he was investigating for the Board of Dentistry. Wait a minute, let me rephrase that. The Kentucky Dental Association voted to supply funds to pay some of these fees of Fowler's. I can't tell you right now who paid them all, but anyway we agreed to spend money because, as I think I said earlier, the Board of Dentistry had a load that they could not handle, in that their attorney had had a heart attack and he could not work, so we agreed to help."

Petitioner Renfro, Sr. and Jr., had a Caroline Sue Snawder sent to them and who was paid for her services by having free dental care from the Executive Secretary of the Kentucky Dental Association, Ted Logan, and a free set of dentures made by the president of the Kentucky Dental Association, Dr. Whettington. The Kentucky Board of Dentistry used Mrs. Snawder's testimony to have an arrest warrant issued against the two James Renfro, for the illegal practice of dentistry, but which charges were dismissed when the matter came before the Court for trial. The Board of Dentistry again, based on Mrs. Snawder's testimony, tried to have James Renfro, Sr. held in contempt of court, but his contempt was reversed by the Kentucky Court of Appeals.

The Dental Association attorney got together with the Board's attorney and after James Gambrel started advertising for prescriptions, had the law partner of

the Board's attorney, a Mr. Don White, sent to Gambrel's denture laboratory for the purpose of entrapping him. Although James Gambel made no denture for Mr. White, an injunction was issued against Mr. Gambrel. Similarly, a criminal charge of an illegal practice of dentistry was brought against Gambrel, but the case was dismissed when it came to trial. The same happened to Petitioners Hudson and Hauner. All this, just to try to stop the Petitioners from obtaining prescriptions directly from the consumer/patients since the Dental Association and Dental Board were blocking them deliberately and consciously from allowing the dentists to freely have an open market as to denture prescriptions.

There have been Court rulings against this, such as, *Rogers* v. *Medical Association of Georgia,* 259 S. 2d 85 (1979) and *Gibson* v. *Berryhill, supra.* Also, see *United States* v. *Foley,* 1979-1 Trade Cases, Sec. 62,577 (4th Cir. 1979), *petition for cert. filed,* 4 Trade Reg. Rep. (CCH) Sec. 60,02 1 (May 18, 1979) (No. 78-1737); *Femist Women's Health Center, Inc.* v. *Mohammad,* 586 F. 2d 530 (5th Cir. 1978), cert. den. 100 S. Ct. 262 (1980), and *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corporation, supra.*

Clearly, Trade Associations such as the Kentucky Dental Association are not exempt from the antitrust laws, for group refusals to deal, see *Eastern States Retail Lumber Dealers Association* v. *United States,* 234 U. S. 60, 58 L. Ed. 1490, 34 S. Ct. 951 (1913); *Sugar Institute* v. *United States,* 297 U. S. 553, 80 L. Ed. 861 (1936); *Millinery Creators Guild, Inc.* v.

F.T.C., 312 U. S. 469, 35 L. Ed. 955 (1941); *Klor's Inc.* v. *Broadway-Hale Stores, supra; Goldfarb* v. *Virginia State Bar, supra,* and *United States* v. *National Association of Real Estate Boards, supra.*

In the case of *The California Motor Transport Company* v. *Trucking Unlimited,* 404 U. S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972), an interesting parallel is discussed to the Petitioners' case (page 612):

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the anti-trust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors."

As Judge Feikens said in his dissent in this case:

> "Dentists have an economic stake in the statute. Unenforced, the private Dental Association is free to wield the statute discriminatively."

II. Does the Ethical Opinion of the Kentucky Dental Association or State Law, Violate the Petitioner's First Amendment Right to Commercial Free Speech to Advertise and Solicit Denture Prescriptions?

The Petitioners state that their right to commercial free speech has been impaired,* by the 1963 ethical opinion or state law.

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*Contrary to the majority opinion of the Court of Appeals, the Petitioner did not discard an appeal on it's First Amendment argument in that Court. The Petitioner had included this as part of its brief in the Sixth Circuit and the same was defended in Respondent's brief to the Sixth Circuit. The same will be sent to the Court, if certiorari is granted.

In 1963, the Supreme Court upheld the First Amendment in *NAACP* v. *Button,* 371 U. S. 425, 83 S. Ct. 328, 9 L. Ed. 2d 405, followed by *New York Times* v. *Sullivan,* 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 ALR 2d 1412, and followed in 1967 by *United Mine Workers* v. *Illinois State Bar Association,* 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).

In 1971 Pennsylvania faced a similar restruction and struck down its restrictions as to pharmacies, in *Pennsylvania Board of Pharmacies* v. *Paster,* 272 A. 2d 487, 44 ALR 2d 1290. Again these cases were followed by *Goldfarb* and *Bigelow* and *Virginia State Board of Pharmacy* and in *Bates,* see also *In re Edna Smith Primus,* 436 U. S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978), and Commerce, Regulating Advertising, 10 L. Ed. 2d 1386.

So if it is by state law, then the Petitioner wishes to have it declared in violation of the First Amendment.

If it is by ethics, with the State Board to enforce it, the Petitioners also wish to declare the actions in violation of the First Amendment.

The right of the public to choose their own laboratory, the Petitioners claim, would not be harmful to the public as *all laboratories* are licensed by the Commonwealth. So the power of the State to protect the public health should not come into play. The old, the poor and the wise consumer should be able to choose his own dental laboratory and to price shop the adver-

tisements of the laboratories. Is it too much to ask that citizens obtain a set of teeth at a price he can comparison shop for?

The Petitioners' argument is the same as was spelled out in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* (page 365):

> "What is at issue is whether a state may completely suppress the dissemination of truthful information about entirely lawful activity, fearful of that information's affect upon its disseminators and recipients . . ."

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioners respectfully request that this Court grant the writ of certiorari.

Petitioners rest their case on the proposition stated long ago by one of the greatest human being of all time:

> "It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."

First Amendment by Abraham Lincoln, December 3, 1981, in "The State of the Union Messages of the President, 1790-1966," Vol. II, p. 1060 (ed. by F. T. Israel, 1966).

Respectfully submitted,

GEORGE C. PONTIKES
SHELDON GARDNER
FOSS, SCHUMAN & DRAKE
11 South La Salle Street
Chicago, IL 60603
Tel. (312) 782-2610

FRANKLIN S. YUDKIN
400 Hart Block Bldg.
730 W. Main Street
Louisville, KY 40202
Tel. (502) 589-4626

Counsel for Petitioners